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No. 91-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEWARK MORNING LEDGER CO.,
as succesor to The Herald Company,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF FREDERIC W. HICKMAN, K. MARTIN WORTHY AND BRADFORD L. FERGUSON IN SUPPORT OF PETITIONER

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Frederic W. Hickman, K. Martin Worthy and Bradford L. Ferguson, with the consent of all parties, submit this brief *amicus curiae* pursuant to Rule 37.2 of the Rules of this Court in support of petitioner Newark Morning Ledger Co.

I. INTEREST OF THE *AMICI CURIAE*

Identity of the *Amici*

This brief is submitted on behalf of the following individual tax practitioners, each of whom previously served in major posts in the Department of the Treasury:

Frederic W. Hickman, Assistant Secretary of the Treasury for Tax Policy, 1972-1975

K. Martin Worthy, Chief Counsel, Internal Revenue Service, 1969 - 1972

Bradford L. Ferguson, Special Assistant to the Assistant Secretary for Tax Policy, 1977-79, Associate Tax Legislative Counsel, 1979 -1980

The views expressed are the personal professional views of the *amici*. This brief is neither authorized nor financed by any client.

Purpose of the Brief

The purpose of this brief is to alert the Court to practical aspects of the tax system which, when combined with a judicial determination in this kind of case, could produce bad tax policy.

The taxpayer petitioner is not in a position to raise these matters with authority and the Department of Justice is unlikely to do so for reasons that will appear.

On balance the matters that we wish to call to the Court's attention support the position of the taxpayer.

II. SUMMARY OF ARGUMENT

The Court should not assume that the government's position here represents a fully considered policy position of the Treasury Department or advances an important goal of the tax system. The government's acquiescence in the petition for certiorari appears to have been made without high level coordination with the Treasury and is inconsistent with major tax policies being pursued by the Treasury.

In order for the Court to adopt the government's position, the Court would need to redefine the word "goodwill". For a court to use a single case to launch a definition is very risky where, as in this case, the definition must apply to a very large universe of other situations, which vary enormously in character and none of which is before the court. It is especially undesirable for Supreme Court decisions to launch new definitions in such a circumstance because there is so little opportunity to adjust the definition as other factual situations are presented. New definitions in such cases should be left to legislation or regulatory procedures, where the broad range of facts can be taken into account.

Legislation is in progress, strongly supported by the Treasury, that would eliminate nearly all disputes of this kind over the amortization of intangibles, including "goodwill". The legislation would relieve the courts, the government and the taxpayers of the burdens of controversy and litigation. A Court decision -- for either party -- cannot achieve that overall result. A Supreme Court decision for the government is, for the reasons explained, likely to derail the legislative effort.

The fact that legislation is in progress would not be a reason for rejecting the government's position here if the law were clearly as the government asserts. But the law is preponderantly to the contrary and legislation provides the best avenue for the resolution of any remaining issues.

Where an asset is shown to be subject to exhaustion in the business over a determinable life, there is no room for construing the language of section 167 of the Internal Revenue Code of 1986 (26 U.S.C.) as inapplicable. The language of the regulation referring to "goodwill" does not purport to require that result and there is no reason to so construe it.

Amortization of the intangibles in issue here is clearly the right answer on analytical, tax policy grounds. Recent Treasury testimony confirms that amortization of intangibles is proper as a matter of tax policy, even in instances where the intangible has an indeterminate life. Where, as here, the trial court's findings of fact determine "the period over which the value disappears" there is no principled ground whatever for denying the amortization deductions prescribed by section 167 of the Internal Revenue Code.

III. ARGUMENT

Aspects Not Addressed

This brief does not discuss the 70 years of case law dealing with "intangibles" (including "goodwill") and their amortization or non-amortization. We assume that will be adequately covered by the parties and other *amici*.

This brief does, however, proceed on the assumptions, which we believe to be correct, that:

- The Internal Revenue Code (section 167) provides generally that in arriving at net taxable income the cost of a business asset that is subject to exhaustion over time shall be offset against revenues through deductions for depreciation or amortization during the life of the asset.

- Treasury regulations interpreting section 167 provide that "goodwill" may not be depreciated or amortized. There has never been a clear and consistent definition of "goodwill". Court cases talk broadly of "goodwill" as linked to continued patronage. But in the absence of more specificity, the lack of a determinable life has become the defining characteristic of "goodwill".
- Over roughly the last twenty years, the courts have increasingly, but not invariably, permitted amortization of intangibles in cases where the intangible could be identified and valued and statistical evidence was sufficient to make a reasonable projection of its "life". (Statistical projection is the classic method of "lifing" assets, whether tangible or intangible. In recent years schedules of lives for broad classes of tangible assets have been prescribed by legislation.) The recent development of computers that can apply advanced statistical methodologies to large data bases has made possible the "lifing" of intangibles that could not, as a practical matter, previously be lifed.
- The court cases are instances in which the IRS contested amortization of an intangible. On balance they support the taxpayer here. However, the court decisions are only part of the story. It is our opinion, based on professional observation and experience, that, in the great majority of taxpayer audits, amortization has been allowed, in the amount claimed or in compromised amount, where estimated lives and values have been supported by data of the kind described. However, intangibles for which no reliable estimates could be made have remained as unamortizable "goodwill".

- The permutations and combinations in which intangibles are found in different businesses are myriad.

The Problem of Judicial Lawmaking in Tax Cases Like This

The government, in effect, seeks in this case (1) a new definition of goodwill that would include subscription lists and (2) a holding that an intangible falling within the boundaries of that definition is non-depreciable even though it is subject to exhaustion over a determinable life.

We assume that other briefs will demonstrate why a Treasury regulation, if construed to preclude amortization of an intangible that is subject to exhaustion over a determinable life, would be an impermissible interpretation of the statutory language.

We wish to make, rather, a more general point about the process of judicial law making. It is that, given the near-infinite variety of intangibles that exist, it is not possible to define "goodwill" satisfactorily in a single case involving a single intangible and a single transaction. Too much is outside the record.

It is not entirely satisfactory even to "prick out" the boundaries of a definition in a series of factual decisions. A clear sense of the universe involved would require weeks of evidence and inquiry. It cannot be [illegible]ned in appeals with tight page limits on briefs and oral arguments.

To make this point is not to criticize the judicial process, but only to recognize that there are problems best left to other procedures and institutions.

In the case of intangibles that are individually identified, valued and lifed, if some are nonetheless to be treated as non-amortizable because they fall within the new definition of

"goodwill" sought by the government, and are thus "inseparable" from "goodwill", how would the boundaries of the new definition be described? Even slight changes in the nature of an intangible may raise major questions in any attempt to formulate a rule. For example, an ordinary subscription like those involved here, is a kind of contract, terminable at will, between the taxpayer and the subscriber. Suppose the contract is for a specific period, not terminable at will. Should the result be the same? Should it make a difference: how many contracts there are? whether they are likely to be renewed? if it is clear they will not be renewed? whether there are likely to be new contracts with other parties? whether the contracts acquired become more profitable or less profitable as time passes? whether the new contracts are as profitable as the old contracts? exactly what kind of contract is involved, *e.g.*, a contract to provide services, or sell goods, or not compete, or to have the right to operate in a certain way or in a certain place?

One cannot safely promulgate a general definition in a case involving one contract without thinking through how the rule would operate in other contexts for other kinds of contracts and for all the kinds of intangibles that are not contracts.

The Special Problem of Supreme Court Decisions in the Tax Area

In addition to the general problems of judicial rulemaking in this kind of tax case, there are special problems that may be created by Supreme Court decisions dealing with tax issues.

The Internal Revenue Code is the lengthiest, most complex, most internally interrelated statute on the books today. It implements a highly specialized system of both law and administration. It deals principally with the determination of "income", a subject whose complexities have been debated extensively by academics for decades and have engaged the

continuous attention of the entire accounting profession. In consequence, there is in the tax area a larger than usual danger that a decision in one case may have unintended implications affecting many other, seemingly unrelated, cases.

Court decisions that produce unintended consequences are an inevitable incident of the judicial process and create mischief wherever they occur. However they are more or less correctable if they occur in the lower courts, as the points can be relitigated in other courts or even in the same court.

But Supreme Court decisions are different. They do not get relitigated. And because they are the "final word" and because the Court ordinarily takes tax cases on *certiorari* in order to settle a rule, the language of the Court's tax conclusions and reasons have come to be very precisely parsed by taxpayers and tax officials alike. The Court's language is treated almost as if it were statutory language. That is unfortunate, for the opinions are surely not written to be treated as statutes. But that is, in fact, what happens today.

The potential for Supreme Court decisions to create havoc in the tax area is well illustrated by the Court's 1988 decision in *Arkansas Best*. (*Arkansas Best Corp. v. Commissioner*, 485 U.S. 212 (1988).) The transaction at issue was an unusual one and the parties argued, *inter alia*, from statutory language of very general applicability, relevant to an enormous universe of ordinary business transactions. The Court was not apprised by counsel of the implications of the statutory language in other contexts, in particular for "hedging" transactions of a kind routinely entered into by thousands of business taxpayers. Nor was the Court advised of the interrelationship of that language and the design of the Internal Revenue Code with respect to "hedging" transactions, as revealed in other Code sections.

For transactions like the more or less out-of-the-ordinary transaction at issue in *Arkansas Best* the Court's decision

settles the law. But the Court's language completely unsettled the law for myriads of previously "garden variety" hedging transactions entered into by many businesses in the ordinary course. Dozens and dozens of articles, speeches and seminars have since been devoted to the new problems created by the language of the opinion and what to do about it.

The Treasury initially made efforts to restore sensible results in the hedging area. It devoted months to an attempt to devise new rules, but ultimately no rules were issued. Treasury apparently concluded that, given the language of the opinion, it could not get to the desired end without leaving itself open to the accusation that it was giving up Treasury revenues without authorization.

Hedging by businesses, including the massive hedging of the kind indispensable to major financial institutions and much of the hedging on the commodities exchanges that exist to facilitate business hedging, is now in limbo. It seems probable that this Court, if and when the hedging issue ultimately comes back before it, would limit or modify the problem language and reach a correct result. But meanwhile, rules that evolved over decades and that were satisfactory to both the Treasury and to the businesses involved lie in doubt and discredit.

The Court cannot be expected to know these things on its own. Realistically, private litigants, even if competent to educate the Court about larger contexts, are not likely to use their limited space and time to do so. The Court must necessarily rely on the government to exercise sound judgment in deciding what tax issues to bring to the Court and how to argue them. *Arkansas Best* shows that the government does not always meet that test. But even under the best of circumstances, the lesson exemplified by *Arkansas Best* is that a single case is a most unreliable context in which to forge new principles or definitions that will be applicable to a wide variety of different factual situations.

Judicial Rulemaking Versus a Legislative Solution for This Kind of Case

Like *Arkansas Best*, the case before the Court is one thread in an extensive web. While the case must be decided, one way or the other, it is a dangerous vehicle for promulgating new, generally applicable definitions applicable to such a large and variable field of facts. The legislative or regulatory arenas are much better places than the courts to formulate definitions cutting through such an extensive universe. The legislative and regulatory processes include opportunities for all interested parties to explain the universe of situations potentially affected.

The Treasury Department and the Congress are currently engaged in a legislative effort to deal with intangibles generally, including "goodwill". The process has been lengthy because there is so much diverse input, and so many taxpayers and kinds of intangibles are potentially involved. Treasury Assistant Secretary Goldberg testified:

> The legislation you are considering is the product of more than 18 months of cooperation among the Congress, the Administration, and the private sector.

Statement of Hon. Fred T. Goldberg, Jr., Assistant Secretary (Tax Policy), Department of the Treasury, Hearings before the Senate Committee on Finance, 102d Cong. 2d Sess., (April 28, 1992) (hereafter "*Goldberg Statement, Finance Hearings*") p. 2.

The proposed legislation is itself testimony to the difficulty of making definitions that would seek to separate some kinds of intangibles from other kinds. It avoids most definitional problems by prescribing a single class, with a single average "life", for virtually all intangibles.

Ironically, for reasons that will be described, a Supreme Court decision for the Treasury on the grounds urged by the Department of Justice in the Third Circuit below could well destroy the legislative effort, strongly supported by the Treasury, to put in place a comprehensive system for dealing with intangibles, including "goodwill" (however defined).

The Formulation of Tax Policy by the Executive Branch

In order to understand how tax cases come to this Court and to evaluate whether the Treasury, as an institution, regards them as important, it is necessary to understand the institutional processes involved.

Within the Executive branch of the government, the development of the tax law is primarily the responsibility of the Treasury Department, and particularly of the Internal Revenue Service and the office of the Assistant Secretary for Tax Policy. To the extent the tax law is developed in litigation, the Department of Justice is also involved.

The primary administration of the tax system lies with the Internal Revenue Service. The "grand design" of system concepts (as distinguished from administrative approaches and procedures) lies with the office of the Assistant Secretary. That office is concerned with the overall development of the rules, whether in legislation, in regulations, in generally applicable rulings, or in litigation policies (as distinguished from -- but not always inseparable from -- the disposition of the liabilities of particular taxpayers). The office of the Assistant Secretary comprises approximately 70 professionals, with a roughly equal number of economists and lawyers. An important function of the office is to estimate the revenue effects of tax changes and to make budget projections with respect to total government revenues.

All cases tried in Article III courts are tried by the Department of Justice. Cases tried in the Federal district

courts and in the United States Claims Court are handled by the Tax Division of the Department of Justice and all tax appeals are under the jurisdiction of the Solicitor General with the assistance of the Tax Division.

Most tax cases, however, originate in the Tax Court. It is not an Article III court and cases there are tried by lawyers from the office of the Chief Counsel for the Internal Revenue Service.

These arrangements bring together formidable resources and on the whole have worked well. However, the overlapping roles described inevitably give rise to turf battles and, when coordination is relaxed, permit significant matters to fall in the cracks. That appears to have happened in this case. It appears that the acquiescence by the Department of Justice in the taxpayer's petition for certiorari received no more than pro forma attention at the top tax policy levels of the Treasury.

The job of good litigators is to win cases. Government tax litigators are not unresponsive to tax policy considerations, but it is not the litigator's function to spend much time thinking about how the tax system should operate and how the case he or she is trying fits into the grand design. In short, once litigation is authorized and passes into the hands of the litigators, it tends to take on a life of its own. That is perhaps even more true for cases tried by Justice lawyers in the Article III courts than for cases tried by IRS lawyers in the Tax Court because the Justice lawyers are further removed than IRS lawyers from the IRS and Treasury offices concerned with the larger aspects of tax administration and policy.

The Department of Justice formally coordinates its tax litigation with the Treasury through the Office of Chief Counsel for the Internal Revenue Service. But there is not close coordination on a day-to-day basis, and given the volume

of cases involved, most "coordinating" moves through lower level channels at the Internal Revenue Service without close attention from senior officials. On appeal, cases commenced in the Tax Court are likely to be followed more closely by the Chief Counsel's Office than cases commenced in the U.S. Claims Court or in a district court (as in this case) because the Tax Court cases were tried by personnel in the Office of Chief Counsel, who are familiar with them and have a stake in their outcome.

Because this case was commenced in a Federal district court, it has been handled throughout by Department of Justice lawyers. Periodic communication between Justice and the Office of Chief Counsel presumably occurred. But cases involving the amortization of intangibles have been generally viewed as turning on their particular "facts and circumstances" and there is no reason to suppose that the case was regarded as sufficiently out of the ordinary to cause it to be followed closely at policy levels of the Internal Revenue Service or the office of the Assistant Secretary.

The government won in the Third Circuit and, in retrospect, Treasury would be better off if the case had been left there.

It was the taxpayer that petitioned for certiorari here. The Department of Justice acquiesced in the petition and the Court's decision to grant it was presumably influenced by that acquiescence.

The Treasury now finds itself in an untenable position. Winning this case on the grounds argued by the government in the Third Circuit would -- paradoxically, but probably -- destroy the chance of enacting pending legislation that would provide an overall legislative solution for the amortization of intangibles, including goodwill. The legislation (H.R. 4210, section 4501), sponsored by Ways & Means Chairman Rostenkowski, has passed the House and is strongly supported

by the Treasury. Treasury testimony before the Senate Finance Committee in April 1992, characterized it as "the most important simplification measure under consideration by the Congress". *Goldberg Statement, Finance Hearings*, p. 1.

In sum, the government's litigation process in this case has slipped free from its tax policy moorings.

The Legislation Jeopardized

The Rostenkowski bill would prescribe uniform lives for the vast majority of intangibles, including goodwill. If enacted, the tax treatment of intangibles would be enormously simplified. The recurring multitude of fact intensive controversies over the nature, value and lives of intangibles would be eliminated in one fell swoop. The Internal Revenue Service would be relieved of an enormous volume of audit issues and the courts would be freed of a very large volume of controversies involving the tax treatment of intangibles. IRS Commissioner Fred Goldberg[1] described the magnitude of the controversies that would be cleared up by the legislation as follows:

> We can describe this systemic problem both statistically and anecdotally. By our best and most recent count, we estimate that there are over 8.5 billion dollars of proposed adjustments in Examination, Appeals, and Counsel case inventories, involving over 2,000 separate intangible asset issues in several hundred cases.

Tax Treatment of Intangible Assets: Hearings before the House Committee on Ways and Means, Serial 102-76, 102d Cong., 1st Sess. (hereafter "*Ways and Means Hearings*") 49

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[1]Mr. Goldberg later became Assistant Secretary (Tax Policy), Treasury Department.

(1991) (statement of Hon. Fred T. Goldberg, Jr., Commissioner of Internal Revenue).

It is not clear whether the legislation, which has already passed the House and is pending in the Senate, would apply retroactively or only prospectively. Even if it did not apply retroactively, the Treasury has indicated that it would greatly facilitate the disposition of controversies with respect to past years, presumably by establishing parameters within which the Internal Revenue Service and taxpayers could reach settlements. Thus Assistant Secretary Gideon testified:

> . . . I think that it's simply a fact, if you look at history, that if you adopt this rule on a prospective basis, it's likely to have an impact on the inventory of disputes still out there.
>
> Reverting to my first role in Government service, I think if I were the chief counsel and such legislation were passed, I'd certainly take into account what Congress had done with the future, in terms of deciding my settlement pattern with respect to my existing inventory.

Ways and Means Hearings, 54 (statement of Hon. Kenneth W. Gideon, Assistant Secretary (Tax Policy), Department of the Treasury).

Mr. Gideon and Mr. Goldberg described the great importance they attached to the legislation, as follows:

> Commissioner Goldberg and I believe that H.R. 3035, which would require amortization of purchased goodwill and other intangible assets over 14 years, is one of the most important simplification proposals before you this year. If enacted it would avoid innumerable tax controversies concerning the tax treatment of future acquisitions.

Ways and Means Hearings, 33 (statement of Hon. Kenneth W. Gideon).

> This bill, in sum, is an opportunity to take a quantum leap in the direction of good tax administration.

Ways and Means Hearings, 51 (statement of Hon. Fred T. Goldberg, Jr., Commissioner of Internal Revenue).

Given the importance the Treasury attaches to the pending legislation and given current Congressional budget procedures, this appeal puts the Treasury and the IRS in a no-win position.

If the government loses this appeal, it has gained nothing. It should not have supported appeal in the first place.

But if the government wins, the likely result is even worse. A win would only settle things for selected items, and the pending legislation -- which would clear up the whole intangibles area and is much more important in the grand scheme of things than this case -- becomes much more difficult, if not impossible to secure. That is because the legislation, heretofore supported as "revenue neutral", becomes a "revenue loser". Under current Congressional rules, a bill that loses revenue can be enacted only on condition that it is accompanied by a measure that raises revenue -- a near fatal condition for a bill of this kind in the present budgetary and political climate.

The "revenue loser" problem arises because the revenue estimate of any proposed legislative change is determined with respect to an assumed baseline, namely, what existing law will produce in the absence of the change. A Supreme Court decision that requires a change in assumptions about existing law changes the baseline. The more items a Supreme Court decision renders non-deductible, the greater is the estimated

"revenue loss" from a bill that permits those same items to be deducted.[2]

The Treasury was and is concerned about this threat. At the Ways and Means hearings last October 2, Assistant Secretary Gideon had the following exchange with Congressman Donnelly:

> MR. DONNELLY [referring to this case]. * * *
>
> . . . [I]f the Court, the High Court, rules and sustains the Third Appeals Court, what revenue impact would the Chairman's legislation have then? Because you've stated that the Chairman's legislation is revenue neutral. If the Court rules and sustains the position of the Service, what revenue impact then would the Chairman's bill have?
>
> MR. GIDEON. It would be speculative for me to state. I think that would be a different world than the world that we're in.
>
> MR. DONNELLY. Could it be in the tens of billions of dollars?
>
> MR. GIDEON. I don't think it would be that significant, but it would be significant.

Ways and Means Hearings, 68.

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[2]This is a simplified statement of the principle. There are more factors involved here, but they do not change the conclusion indicated, as Mr. Gideon's remarks below corroborate. The Treasury's revenue estimation function was under Mr. Gideon's supervision, as Assistant Secretary, at the time of his remarks (and was under Mr. Hickman's supervision, as Assistant Secretary, from 1972-1975.)

The Cost of Subscriptions Should, in Principle, Be Amortized

A final note, to put the substantive issue of amortization into perspective and explain why the taxpayer's position is also the "right" position from a tax policy point of view:

There is general agreement at the Treasury and in the accounting profession that proper measurement of "income" requires that the cost of intangibles be recovered on some basis over time; that intangibles are "wasting" assets, *i.e.*, are gradually exhausted in the business; and that even the inability to determine a "life", as in the case of goodwill, should not prevent the offsetting of such costs against revenues in order to arrive at net "income". Thus Assistant Secretary Gideon testified before the House Ways and Means Committee on October 2, 1991:

> Financial accounting conventions have over time begun to require amortization or depreciation of goodwill in order to prevent financial statements from overstating assets and income. The financial accounting community has recognized that goodwill is not a perpetual asset akin to land or a fine painting, but rather that the value of goodwill and other intangible property is eventually consumed in the production of income, even though the period over which the value disappears may be indeterminate.
>
> Thus, there is a discontinuity between sound accounting practices and the tax rule that goodwill cannot be amortized.
>
> * * *
>
> [The] statistics indicate that intangible assets are more significant than in earlier years.
>
> We believe that the time has come to adopt statutory amortization rules for intangible property . . . .

Ways and Means Hearings, 29-30 (statement of Hon. Kenneth W. Gideon).

The General Accounting Office representative testified to the same effect on the same day:

> Financial accounting requires the amortization of goodwill while tax accounting does not allow it. Financial accounting requires such write-offs because goodwill is generally recognized as a wasting asset. Allowing tax deductions for the cost of all wasting intangible assets consumed by a business would improve the measurement of income and treat all forms of investment more equitably.
>
> Establishing statutory cost recovery periods would simplify useful life determinations.

Ways and Means Hearings, 76 (statement of Jennie S. Stathis, Director for Tax Policy and Administrative Issues, General Government Division, U.S. General Accounting Office).

In this case, there is no dispute that the subscribers acquired and the value ascribed to them would be exhausted, on average, over the period of years determined. The trial court so found.

No doubt the taxpayer hoped that as the acquired subscribers disappeared, new "self-created" subscriptions and subscribers would be obtained. No doubt it hoped that those new subscriptions would outnumber old subscriptions lapsed.

But new self-created subscriptions are not relevant in determining how to account for the subscriptions acquired. New subscriptions, however many may materialize, will be accounted for in accordance with the rules applicable to subscriptions self-created by newspapers generally. Under current rules most of the cost of self-created new subscriptions are expensed, rather than capitalized. As a result, when the subscriptions originally acquired have lapsed and been completely amortized, the cost of all subscriptions will have

disappeared completely from the assets reflected on the taxpayer's balance sheet, no matter however many new subscriptions remain in force. That fact appears to be the source of much of the analytical confusion.

To illustrate, assume that 100 old subscriptions are purchased for $100x and that the 100 old subscribers have been replaced by 100 new subscribers. Some are tempted to argue -- and it appears to be the government's "logic" in this case -- that nothing has happened; there are still 100 subscribers and $100x should remain on the books, unamortized.

The fallacy in the logic is seen easily the moment one moves to the less artificial assumption that one-for-one replacement is unlikely. If the 100 original subscriptions lapse and there is no replacement, it would be obvious to most observers that the original $100x should have been amortized over time. If the 100 original subscriptions lapse over time and the taxpayer purchases 100 new subscriptions from another company, but the value of a single subscription has changed so that the purchase price is $80x or $120x, it would be also obvious to most observers that the original $100x should be amortized and replaced by the new $80x or $120x, as the case might be.

In short, the old subscriptions should be separately accounted for as they disappear, and the new subscriptions should be separately accounted for as they appear.

The confusion arises when the new subscriptions are self-created. In the case of subscriptions that are self-created, the costs of solicitation and advertising, which are perhaps the chief expenditures responsible for producing subscriptions, are ordinarily "expensed", *i.e.*, treated as currently deductible "ordinary and necessary business expenses". That "expensing" treatment is a tax policy compromise between

logic and practicality and has been reexamined and readjusted over the years by both the Treasury and the Congress. In the subscription examples, expensing does produce the result, puzzling perhaps at first blush, that while the $100x is amortized as the subscriptions for which it was paid disappear, no new value appears for the asset represented by the new subscriptions. "How can it be," some ask, "that 100 subscriptions are treated as amortizable wasting assets when there are still 100 subscriptions on hand?"

The answer is that there are old, purchased subscriptions and new, self-created subscriptions and they are subject to different rules. Good accounting requires that individual items be dealt with individually to the extent practicable. The result regarded as curious is the result of the expensing treatment for the new items. Because self-created subscriptions are the norm, expensing is the generally applicable treatment. Amortization of the old subscriptions brings a purchasing taxpayer gradually into line with taxpayers generally.

IV. CONCLUSIONS

We respectfully submit that:

1. While the Court may in past years have relied on the government, as guardian of the tax system, to put tax issues in careful perspective and balance, no such reliance is justified in this particular case. The government's acquiescence in the petition for certiorari appears to have been made without high level coordination with the Treasury and is inconsistent with major tax policies being pursued by the Treasury.

2. In order for the Court to adopt the government's position, the Court would need to conclude that the word "goodwill" encompasses at least some items that have a determinable life. That conclusion entails a redefinition --

whether explicit or implicit, and whether comprehensive or partial -- of the word "goodwill". For a court to use a single case to create a definition is very risky where, as in this case, the definition must apply to very large universe of other situations, which vary enormously in character and none of which is before the court.

It is especially undesirable for Supreme Court decisions to launch new definitions in such circumstances because there is so little opportunity to adjust the definitions as other factual situations are presented.

New definitions in such cases should be left to legislation or regulatory procedures where the broad range of facts can be taken into account.

3. Legislation is in progress, strongly supported by the Treasury, that would eliminate nearly all disputes over the amortization of intangibles, including goodwill. That would relieve the courts, the government and the taxpayers of the burdens of controversy and litigation. A Court decision -- for either party -- cannot achieve that overall result. It would affect only selected intangibles and controversy would continue. A Supreme Court decision for the government would, for the special reasons explained, likely derail the legislative effort.

The fact that legislation is in progress would not be a reason for rejecting the government's position here if the law were clearly as the government asserts. But the law is preponderantly to the contrary and legislation provides the best avenue for the resolution of any remaining issues.

4. Where an asset is shown to be subject to exhaustion in the business, there is no room for construing the language of section 167 of the Internal Revenue Code as inapplicable. The language of the regulation referring to "goodwill" does not

purport to require that result and there is no reason to so construe it.

5. Amortization of the intangibles in issue is clearly the right answer on analytical, tax policy grounds, even where no determinable life can be established. As the Treasury Assistant Secretary testified last October 2, " . . . the value of goodwill and other intangible property is eventually consumed in the production of income, even though the period over which the value disappears may be indeterminate." Where, as here, the trial court's findings of fact determine "the period over which the value disappears" there is no principled ground whatever for denying the amortization deductions prescribed by section 167 of the Internal Revenue Code.

Respectfully submitted,

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